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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL MICHAEL RUIZ,

Defendant and Appellant.

F056634

(Super. Ct. Nos. 1083929 & 1094877)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Joseph M. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Paul Michael Ruiz was convicted of various crimes related to multiple home burglaries he committed while residents were on vacation. On appeal, he contends (1) the trial court erred when it failed to hold a hearing to determine whether juror misconduct had occurred, and (2) the trial court erred by imposing sentence on two counts arising from events occurring during a single burglary. We will affirm.

PROCEDURAL SUMMARY

On September 17, 2007, the Stanislaus County District Attorney charged defendant in a consolidated information with three counts of first degree burglary (Pen. Code, § 459;^[1] counts I, X, XII), grand theft of a firearm (§ 487, subd. (d)(2); count II), possession of a firearm by a felon (§ 12021, subd. (a); count III), five counts of receiving stolen property (§ 496, subd. (a); counts IV-VII, IX), possession of a controlled substance (Health & Saf. Code, § 11377; count VIII), and unlawful taking or driving of a vehicle (Veh. Code, § 10851; count XI). The information also alleged that defendant had been released on bail at the time of some of the offenses (§ 12022.1), had suffered a prior first degree burglary conviction (§§ 459, 667, subd. (a)), had been convicted of a prior serious felony (§§ 1192.7, subd. (c), 667, subd. (d)), and had served two prior prison terms (§ 667.5, subd. (b)).

A jury found defendant not guilty on counts I and II, and guilty on counts III through XII. The trial court found true all the special allegations. The court sentenced defendant to a total term of 25 years 4 months in prison, which several months later was increased to a total of 30 years when the court sentenced defendant in two other cases.

FACTS

In the fall of 2004, defendant burglarized several homes in a particular area of Modesto. In July 2005, after he was released on bail, he burglarized at least two more homes. During a police surveillance on July 7 and 8, 2005, the police caught defendant

¹ All statutory references are to the Penal Code unless otherwise noted.

and two other people in the act of burglarizing the home of Mr. and Mrs. B. on Enslen Avenue. The relevant details are recounted below.

DISCUSSION

I. Jury Misconduct

Defendant contends the trial court abused its discretion and denied his right to due process when it chose not to hold a hearing to determine whether jury misconduct had occurred.

A. *Facts*

While the jury was deliberating, the court received from the jury a note stating: “Juror Number 5 feels bullied by Number 7. This matter needs to be addressed and dealt with in a timely manner.” The court and both counsel discussed the best approach to the problem. The following was said:

“THE COURT: So the question is: What’s the best way to do that?

“[DEFENSE COUNSEL]: I can only say that I had a similar situation in a trial a few years back. And the judge interviewed each [juror] privately in front of counsel, but one at a time, just to try to find out what was going on.

“THE COURT: I could do that. [¶] My inclination was just to have them all come out here and advise them and see if that calms things down enough to lead to productive discussions.

“[PROSECUTOR]: I think that’s a good first step, your Honor, and that may cure the problem.

“THE COURT: I don’t want to make more of this than is necessary at this point. [¶] Now, are you willing to waive [defendant’s] presence for that?

“[DEFENSE COUNSEL]: I am, if I’m able to do that. [¶] ... [¶]

“THE COURT: All right. Let’s have the jurors come out.”

The court then gave the following admonition to the jurors:

“It’s come to my attention that there [may] be some dissension among the jurors. And let me just say that this was a fairly—well, it wasn’t all that long a trial, but in terms of the time that you folks have put in through jury selection, through the testimony, the deliberations, and the fact that you are dealing with 12 counts makes this a somewhat complicated case. And it is not always easy to find your way through all 12 counts, and I understand that.

“Each of you is entitled to whatever opinions you may have. In order to effectively deliberate, it’s important that each of you be heard. It’s equally important that each of you respect the views of each other.

“It may be that ... at the end of your deliberations, it may be that you don’t reach verdicts on any counts or all counts, but it’s important that you each listen to each other, you each respect each other, and if you believe that from listening to each other that you should change your vote[, y]ou should do that[. A]fter having listened to each other you believe that your position is correct, then you are entitled to maintain your position. That’s just the nature of the process.

“It may be that as a result of that you can reach verdicts on all counts; it may be that you can’t reach verdicts on any count; or you may reach verdicts on some but not all. And that’s okay.

“I would encourage you to continue your deliberations, that you listen to each other, that you respect each other. It’s okay to try to convince each other, but you need to do that in a respectful fashion.

“All right. And with that, anything from Mr. [Prosecutor] or Mr. [Defense Counsel]?”

“[DEFENSE COUNSEL]: No, your Honor.

“[PROSECUTOR]: No, your Honor.

“THE COURT: With that, I’ll ask that you resume your deliberations and wish you well.”

B. Analysis

As these facts demonstrate, defendant did not object to the admonition and thus he has forfeited this claim. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1308.) Contrary to

defendant's suggestion, there is no indication that such an objection would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 821 [futility exception typically arises when trial court has overruled defendant's objections in a manner that suggests further objections would be useless].)

In any event, the trial court's strategy, evaluated at the time of the alleged misconduct, was within the bounds of reason. "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.'" (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing regarding a juror's alleged misconduct "is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citation.]'" (*Ibid.*) The decision to conduct a hearing in the first instance is also reviewed under the abuse of discretion standard. (*People v. Burgener* (1986) 41 Cal.3d 505, 520-521 [alerted to possibility that a juror was drunk during deliberations, trial court should have conducted an inquiry sufficient to establish whether good cause for discharge existed], disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 749; *People v. Seaton* (2001) 26 Cal.4th 598, 676 ["specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion"].)

After the trial court in this case was informed that one juror was bullying another, the court chose to thoroughly admonish the jury as a whole, but not draw too much attention to the issue, or single out particular jurors, which might have exacerbated the dissension. In our opinion, the court did not err when it decided not to conduct a hearing into the alleged misconduct. Rude behavior between jurors does not necessarily amount to misconduct. "Jurors may be expected to disagree during deliberations, even at times in heated fashion.'" (*People v. Keenan* (1988) 46 Cal.3d 478, 541.) "[E]xpression[s] of frustration, temper, and strong conviction against the contrary views of another panelist"

are sometimes part of the deliberative process and are not a basis for reversal. (*Ibid.*) We believe the trial court acted within its discretion by admonishing the jurors as it did.

II. Dual Punishment—Section 654

Defendant argues that two of the convictions were based on the same burglary and therefore he should not be punished for both. Specifically, he points to the conviction in count X for the burglary of Mr. and Mrs. B.'s home and the conviction in count XI for the taking of Mr. and Mrs. B.'s Cadillac. Defendant asserts that the Cadillac was taken during the burglary, and that the crimes were part of an indivisible course of conduct pursuant to a single objective because the Cadillac was taken to transport the items stolen in the burglary. We see no error here.

A. Facts

In the early morning of July 8, 2005, while defendant was out on bail, several Modesto police officers in plain clothes and unmarked cars were involved in the surveillance of a particular white Volvo. At about 2:00 or 3:00 a.m., the Volvo left the Econo Lodge on Kansas Avenue and drove onto Ensen Avenue. It parked and some people got out and went down an alleyway. After about 30 minutes, the Volvo left and returned to the Econo Lodge.

At about 4:35 a.m., Officer Hinkley, who was not part of the surveillance team, spotted the Volvo. He tried to catch up to it, but it accelerated. The Volvo failed to stop for a red light, so Hinkley conducted a traffic stop. He arrested the driver, who was defendant's brother and a probationer.²

At about 6:30 a.m., the Volvo was on the move again. It left the Econo Lodge, returned to Ensen Avenue, and parked in front of Mr. and Mrs. B.'s home. Tanisha Flaherty got out of the driver's side and James Nelson got out of the passenger's side. About 15 to 30 minutes later, Tanisha came out of Mr. and Mrs. B.'s home and returned

² Apparently, a passenger in the Volvo returned with it to the Econo Lodge.

to the Volvo. As she drove away, she pulled behind a white Cadillac. James Nelson was driving the Cadillac and defendant was in the front passenger seat. The two vehicles followed each other for some distance, then turned into an alley and stopped. Defendant and Nelson got out of the Cadillac and passed duffel bags from the Cadillac to the Volvo, finishing the transfer in less than a minute. They got into the Volvo, driven by Tanisha, and drove away. The abandoned Cadillac stood running with the driver's door open. The Cadillac was registered to Mr. and Mrs. B. on Enslen Avenue.

Officers pursued the Volvo. When Detective Bennett approached the Volvo, he made eye contact with Tanisha and attempted to make a traffic stop. Bennett put on his vehicle's lights and siren and continued in pursuit. Eventually, the Volvo pulled into an apartment complex and two males got out and ran. Tanisha continued driving, but officers stopped her and took her into custody. The Volvo contained household items, including paperwork bearing Mr. and Mrs. B.'s address, and items from another burglary committed a few days earlier. The Volvo also contained three pairs of cloth gloves.

As Detective Beffa approached the apartment complex, he saw a suspect running. When Beffa pursued the suspect on foot, he found him knocking on an apartment door. The suspect was sweating and breathing heavily. At that time, Beffa recognized him as James Nelson and arrested him. Defendant, however, escaped apprehension.

The police investigated the home of Mr. and Mrs. B., who were on vacation, and found it had been broken into and ransacked. The detached garage had also been entered and ransacked, and there was no vehicle inside. Keys were scattered along the concrete path leading from the house to the garage. Mr. and Mrs. B. kept their keys in a kitchen drawer.

The room at the Econo Lodge, registered to defendant's brother, contained property taken from Mr. and Mrs. B.'s home.

During the following weeks, the police watched defendant's vehicle, and on September 27, 2005, they spotted him walking toward his vehicle outside a hotel. When

several police units moved in, defendant started running. One of the police vehicles struck defendant and he fell to the ground. The officers converged and arrested him.

At sentencing, the trial court imposed consecutive sentences on counts X and XI, finding that “the crimes were predominantly independent of each other and committed at different times or separate places”

B. Analysis

Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.³ (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) “Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the ‘intent and objective’ of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

In addition, ““a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]” (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

³ Section 654, subdivision (a) states: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

“Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted ‘one indivisible course of conduct’ for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately.” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.)

“Whether multiple convictions are part of an indivisible transaction is primarily a question of fact. [Citation.] We review such a finding under the substantial evidence test [citation]; we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” (*People v. Martin, supra*, 133 Cal.App.4th at p. 781.) Where the trial court imposes consecutive sentences, it impliedly finds the defendant entertained multiple criminal objectives and we must determine whether such a finding is supported by substantial evidence. (*People v. Gaio, supra*, 81 Cal.App.4th at p. 935.)

In this case, the perpetrators broke into and removed property from Mr. and Mrs. B.’s home, presumably during the 2:00 or 3:00 a.m. trip to the home. The perpetrators took the property back with them to the Econo Lodge, where the property was later found. At some point, the perpetrators entered Mr. and Mrs. B.’s detached garage with a key from the kitchen drawer.

The perpetrators returned to Mr. and Mrs. B.’s home at about 6:30 a.m. At about 6:45 or 7:00 a.m., they left with the Cadillac, which they had loaded with more of Mr. and Mrs. B.’s property. After the perpetrators transferred this property to the Volvo, the police stopped the Volvo with the property inside. In sum, the burglary of the home occurred around 2:00 or 3:00 a.m. (or earlier) and the taking of the Cadillac occurred at least three to five hours later, around 6:45 or 7:00 a.m.

These facts provided substantial evidence to support the trial court’s finding that defendant entertained multiple criminal objectives. Even if his overall aim was to take property from Mr. and Mrs. B.’s home, the burglary and the taking of the Cadillac were “temporally separated in such a way as to afford the defendant opportunity to reflect and

to renew his ... intent” (*People v. Gaio, supra*, 81 Cal.App.4th at p. 935.) The trial court did not abuse its discretion when it imposed separate punishment for the two crimes.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Cornell, J.